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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-020270 06/25/2012

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

WILLIAM R COULTER, et al. JOSEPH A SCHENK

v.

GRANT THORNTON L L P, et al. JAMES DEMOSTHENES SMITH

J STEVEN SPARKS

MINUTE ENTRY

The Court has read and considered the briefing on Defendant Grant Thornton, L.L.P.'s ("Grant Thornton") Motion to Dismiss. The parties have requested oral argument. The Court finds that the briefing is sufficient and that oral argument would not add to the Court's consideration of the issues presented. Accordingly, oral argument is waived pursuant to Ariz. R. Civ. P. Rule 7.1(c)(2) to expedite the business of the Court. The Court issues the following rulings.

I.

Grant Thornton moves to dismiss Counts II-IV, V, VI, and VIII of the Complaint, arguing that statutes of limitation bar these six claims.[1] As the longest statute of limitations that applies to these claims is three years, Grant Thornton argues these claims are time-barred

[1] The statute of limitations on Counts II-IV (breach of fiduciary duty, professional negligence, and negligent misrepresentation) is two years. *See* A.R.S. § 12-542. The statute of limitations on Count V (common law fraud) is three years. *See* A.R.S. § 12-543(3). The statute of limitations on Count VI (aiding and abetting) is governed by the statute of limitations on the underlying tort action—i.e., at most three years. *See YF Trust v. JP Morgan Chase Bank, N.A.*, 2008 WL 821856, at *7 (D. Ariz. 2008). The statute of limitations on Count VIII (violation of A.R.S. § 13-2310, Arizona's racketeering statute) is three years. *See* A.R.S. § 13-2314.04(F).

because the claims against it accrued in 2006 and 2007. Additionally, Grant Thornton moves to dismiss Count VII (civil conspiracy), arguing there is no such claim under Arizona law.

A. *Statute of Limitations.*

Grant Thornton argues that the applicable two and three year statutes of limitation bar claims II-IV, V, VI, and VIII of the Complaint. This argument hinges on the date upon which the statutes of limitation started to run. Grant Thornton makes the case that the statutes of limitation started running in 2006 and 2007 when Plaintiffs received Statutory Notices of Deficiency from the IRS regarding their use of Defendants' tax structures (the "Notices"). Grant Thornton asserts that, as the Complaint was served upon it on November 23, 2011, the claims are time-barred because each accrued before November 23, 2008. Plaintiffs argue that, at the time the Notices were received in 2006 and 2007, there was no final assessment of liability against them and, therefore, the statutes of limitation had not yet starting running. Plaintiffs contend that the statutes of limitation started running in July and August of 2011 when Plaintiffs entered into closing agreements with the IRS and the claims, thus, are not time-barred. Plaintiffs also assert that Defendant Stover's affirmations to Plaintiffs that the IRS assessments were legally unfounded concealed the fact that harm had been suffered in 2006 and 2007.

"It is well settled in this state that the defense of the statute of limitations may be raised by way of a motion to dismiss where it conclusively appears from the face of the complaint that the claim is barred." *Engle Bros., Inc. v. Super. Ct.*, 23 Ariz. App. 406, 408, 533 P.2d 714, 716 (1975). If the complaint, on its face, indicates that the action is barred by the statute of limitations, the plaintiff bears the burden of proving that the statute was tolled. *Id*.; *Cooney v. Phx. Newspapers, Inc.*, 160 Ariz. 139, 141, 770 P.2d 1185, 1187 (App. 1989). Generally, under the discovery rule, a cause of action accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, the facts underlying the cause. *Gust, Rosenfeld, & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). "A plaintiff need not know *all* the facts underlying a cause of action to trigger accrual." *Doe v. Roe*, 191 Ariz. 313, 323, 955 P.2d 951, 961 (1998) (emphasis in original). Rather, a plaintiff must possess "a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Id*. A plaintiff must be able to "connect the 'what' to a particular 'who' in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault." *Walk v. Ring*, 202 Ariz. 310, 316, 44 P.3d 990, 996 (2002), *citing Doe*, *id*. at 323-24, 955 P.2d at 961-62. Additionally, as with other claimants, a malpractice plaintiff need not sustain all of his damages for a negligence action to accrue. *Glaze v. Larsen*, 207 Ariz. 26, 30 n.1, 83 P.3d 26, 30 n.1 (2004). The plaintiff must have sustained appreciable, nonspeculative harm or damage as a result of the alleged malpractice. *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 252-53, 902 P.2d 1354, 1356-57 (App. 1995).

Specifically at issue in this case is whether receipt of a Statutory Notice of Deficiency from the IRS provides enough facts underlying a cause of action for accounting malpractice to trigger accrual. In other words, does a Statutory Notice of Deficiency provide a plaintiff with the minimum requisite of knowledge adequate to identify that a wrong has occurred and caused an injury to the plaintiff?

The Arizona Court of Appeals addressed this very issue in *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.,*, 198 Ariz. 173, 7 P.3d 979 (App. 2000). In *CDT*, the court stated, "CDT raises an issue of first impression in this state: When does a cause of action accrue for accountant malpractice that allegedly causes an assessment of delinquent taxes, interest, and penalties against the taxpayer?" *Id*. at 175, 7 P.3d at 981. In that case, the trial court granted summary judgment in favor of the defendant accounting firm on statute of limitations grounds. The trial court determined that the statute of limitations began to run upon notification by the California State Board of Equalization ("CSBE") in a preliminary audit report. In overruling the trial court's ruling, the Court of Appeals adopted a "bright line rule" regarding the timeliness of accounting malpractice actions. The court formally adopted the California rule from *International Engine Parts, Inc. v. Feddersen & Co.*, 888 P.2d 1279 (Cal. 1995). In *Feddersen*, the court held that "[t]he deficiency assessment serves as a *finalization* of the audit process and the commencement of actual injury because it is the trigger that allows the IRS to collect amounts due and the point at which the accountant's alleged negligence has caused harm to the taxpayer." *CDT*, 198 Ariz. at 180, 7 P.3d at 986, *citing Feddersen, id*. at 1285 (emphasis in original). The *Feddersen* court noted:

Prior to the penalty assessment, the preliminary findings of the auditor as noted in the audit report are merely *proposed* findings, subject to review and negotiation. We are persuaded by decisions of the Court of Appeals, the majority of sister state jurisdictions, and the federal circuit courts, that actual harm occurs on the date the tax deficiency is assessed.

Id., *citing Feddersen, id.* at 1280 (emphasis in original). The *CDT* court found "the conclusion and reasoning of *Feddersen* persuasive and applicable" and adopted it formally. *CDT*, 198 Ariz. at 180, 7 P.3d at 986. The *CDT* court was persuaded by the rationale of *Feddersen* that this bright line rule was important to conserve judicial resources and to avoid forcing a plaintiff to bring an accounting malpractice action while the audit is pending. *Id*. Thus, the *CDT* court adopted the rule that a plaintiff's claim of accounting malpractice accrues when the plaintiff is issued a notice of determination. *Id*. at 182, 7 P.3d at 988.

Plaintiffs make the case that the Notices should not start the statute of limitations clock because the Notices "had nothing whatsoever to do with their ultimate tax liability." (Resp. to Def. Grant Thornton, LLP's Mot. to Dismiss at 7.) Plaintiffs assert that the amount of the deficiency was grossly inflated and that the exact amount they were liable for was not

ascertainable until they settled with the IRS in tax court in July and August of 2011. The Court is not persuaded by this argument for two reasons. First, the court in *CDT* explicitly held that the statute of limitations for an accounting malpractice claim starts running when the plaintiff is issued a notice of determination. *See CDT*, 198 Ariz. at 179, 7 P.3d at 985. Here, Plaintiffs attempt to liken the facts to the audit process in *CDT*. However, the facts in this case indicate that the IRS had moved beyond the audit process when the Notices were issued. Plaintiffs' decision to fight the IRS in tax court does nothing to change the fact that the Notices put Plaintiffs on notice of a potential accounting malpractice claim. Second, Plaintiffs' contentions that the statutes of limitation are tolled because the deficiency was grossly inflated and the ultimate amount to be paid was not ascertained in 2006 and 2007 are equally unpersuasive. Whether or not the final amount to be settled on (after tax court litigation) was determined, Plaintiffs had sustained appreciable, nonspeculative harm or damage as a result of the alleged malpractice. *Comm. Union Ins.*, 183 Ariz. at 252-53, 902 P.2d at 1356-57. Plaintiffs argue that the Notices were speculative, bolstered by Defendant Stover's advice "that the IRS' position was incorrect and without merit and that they should vigorously contest the IRS' position in United States Tax Court." (Compl. at ¶ 70.) However, this argument has more to do with Defendant Stover's concealment of claims than it does to the tolling of the statutes of limitation as to Grant Thornton and does not alter the Court's determination that issuance of the Notices mark the accrual date of Plaintiffs' claims against Grant Thornton.[2]

In sum, in accordance with *CDT*, the Court finds that the Notices provided Plaintiffs with a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury. In 2006 and 2007, Plaintiffs knew the facts underlying their cause and were able to connect the "what" to a particular "who" in such a way that a reasonable person would be on notice to investigate whether the injury might result from fault. *See Walk*, 202 Ariz. at 316, 44 P.3d at 996. The Court finds that Plaintiffs' claims accrued in 2006 and 2007. As Grant Thornton was served the Complaint on November 23, 2011, Counts II-IV, V, VI, and VIII are time-barred by the applicable statutes of limitation.

B. *Civil Conspiracy Claim (Count VII).*

Citing *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 412 P.2d 47 (1966), Grant Thornton asserts that there is no claim under Arizona law for civil conspiracy. The Court disagrees. Our Supreme Court has specifically recognized a civil action for conspiracy. "'For a civil conspiracy to occur two or more people must agree to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, causing damages.'" *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 498, 38 P.3d 12, 36 (2002), *citing Baker v. Stewart Title & Trust of Phoenix*, 197 Ariz. 535, 542, 5

[2] Defendant Stover has not been employed by Grant Thornton for over ten years

P.3d 249, 256 (App. 2000) (quoting *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 306, 757 P.2d 105, 110 (App. 1998)). However, an agreement to do a wrong, by itself, imposes no liability; an agreement plus a wrongful act can result in liability. *Wells Fargo, id*. "[L]iability for civil conspiracy requires that two or more individuals agree and thereupon accomplish 'an underlying tort which the alleged conspirators agreed to commit." *Id., citing Baker, id.* at 545, 5 P.3d at 259. Conspiracy is a derivative tort. *Rowland, id.* The Court having ruled the statutes of limitation bar Plaintiffs' tort claims against Grant Thornton, there remain no underlying tort claims that, if proven, would provide the basis from which a conspiracy claim could be made. *See Rowland, id.*; *see also Everson v. Everson*, 2010 WL 729242, at *4 (D. Ariz. Mar. 2, 2010).

II.

Because of the Court's rulings on the first two issues raised in Grant Thornton's Motion to Dismiss, the Court need not address issues three through six. Based on the foregoing,

IT IS ORDERED granting Grant Thornton's Motion to Dismiss.

Date: June 27, 2012

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.